



Jonah Seiger <jseiger@mindshare.net> on 05/29/2002 04:22:11 PM

To: BCRAsoftmon@FEC
cc:

Subject: Comments on BCRA attached

To whom it may concern:

Attached please find comments from Mindshare Internet Campaigns LLC on the BCRA. We appreciate the opportunity to contribute to the FEC's decisions on this important issue.

If you have any questions or require additional information, please contact me at:

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Sincerely,

Jonah Seiger

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- mindshare comments.pdf



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May 29, 2002

Ms. Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

**COMMENTS SUBMITTED ON PROPOSED 11 CFR 100.26:
DEFINITION OF "PUBLIC COMMUNICATION"**

Dear Ms. Smith:

Mindshare Internet Campaigns LLC respectfully submits the following comments on the FEC's draft rulemaking regarding Proposed 11 CFR 100.26 relating to the implementation of the Bipartisan Campaign Reform Act of 2002 (BCRA).

Mindshare Internet Campaigns provides online strategy and technology development services to public affairs campaigns. Our clients include many of the nation's leading associations, coalitions, corporations, non-profit organizations, PACs, and foundations. Since our founding in 1997, Mindshare has taken an active role in discussions about the future of the Internet and politics. While we do not work for candidates for elected office, we recognize that the decisions made by the Commission in this area will have a profound impact on the development of the Internet as a platform for political communication.

We applaud the care and foresight the Commission has applied to date with respect to the Internet. Since 1995, the Commission has considered several critical questions regarding the role of the Internet in our nation's political process. In every case, the Commission has approached these questions with a sensitivity to the evolving nature of the medium and an apparent desire to avoid excessive regulation that might stifle the growth of this exciting and powerful communications platform.

In Proposed 11 CFR 100.26, we are pleased that the Commission has not included the Internet as a form of "general public political advertising" as part of the definition of "public communication" under the Act.

We strongly encourage the Commission to affirmatively exclude the Internet (communications provided through the use of World Wide Web sites available to the public, widely distributed electronic mail, and other uses) from this definition, as Congress intended, in the final rules for the reasons discussed below:

Congress clearly intended to exclude the Internet from this provision of the BCRA.

Given the significant public policy issues raised by this question, it is important to note that in enacting the BCRA, Congress excluded the Internet from the definition of "public communication."

This was not an oversight.

Congress has been well aware of the medium for many years, and has debated and enacted numerous bills relating to Internet content, privacy, security, copyright, taxation, and other areas.

Congress has taken a relatively careful approach with respect to regulating the Internet. Recognizing that the medium is still in its infancy, Congress has approached regulation of the Internet cautiously, and in most cases has sought to narrowly tailor any regulation to avoid unintended consequences.

This cautious approach is reflected in the BCRA. Congress had ample opportunity to include the Internet in this section of the Act, and the fact that the term is not specifically included is a clear signal that Congress considered and rejected its inclusion. On March 22, 2002, a key sponsor of the House measure, Rep. Christopher Shays (R-CT), told Forbes.com, "The Internet is not really the problem right now. There is a general feeling that, if in doubt, stay away from putting on any restrictions."¹

Indeed, Title V of the BCRA contains provisions relating to disclosure of campaign finance data via the Internet. Congress clearly recognized that the Internet can play an important role in public access to campaign finance information. The presence of sections relating to the Internet in one provision of the Act further emphasizes that Congress was well aware of the medium and chose specifically to exclude it from other provisions of the BCRA.

¹ Forbes.com: "Congress' Gift to the Internet" <http://www.forbes.com/2002/02/26/campaignfinance.html>
March 22, 2002

Mindshare Internet Campaigns encourages the Commission to consider the strict interpretation of the statute in developing the final rules for 11 CFR 100.26 by leaving the Internet out of the definition of "public communication."

The Commission's previous rulemakings on the extent to which the Internet should be considered "general public political advertising" have been limited to labeling of content, not the specific use of the Internet for public communication with voters.

In previous rulemakings, the Commission has said that the use of the Internet for *express advocacy* communications or political fundraising constituted "general public political advertising." (11 CFR 110.11, and AOs 1998-22, 1995-9, and AO 1999-37).

These opinions focus on the very narrow question of whether a Web site or e-mail that contained *express advocacy* or solicited a contribution should include an appropriate disclaimer, stating who paid for the communication and whether the communication was authorized by a candidate or candidate's committee.

We believe that these opinions were appropriately narrow, measured, and balanced. The question of whether such communication should include a disclaimer is distinctly different from the question raised by the Commission in the NRPM. The current question is whether specific use of the Internet in a campaign is a form of "public communication" subject to the spending limitations under the BCRA.

The Internet is a distinctly different medium from broadcast, cable, satellite, newspaper, magazine, outdoor advertising facilities, mass mailing or telephone bank to the general public. It is an open, decentralized platform on which every user has the capacity to reach literally every other user. Candidates and interest groups can and do use this medium to engage in meaningful, two-way dialogue with citizens.

In considering the definition of "public communication" in the BCRA, Congress did not include other forms of two-way dialogue such as candidate forums, rallies, debates, or other events that are open to the public. Instead, Congress sought to limit expenditures for certain, specific types of one-way communications such as broadcast TV or mass mailings.

There is a fundamental distinction between public communication in traditional media and that which occurs on the Internet. Although information may be widely "available" online, it is not necessarily the case that such information will be widely "accessed." Even in the case of online advertising and mass e-mails, users must affirmatively act to access the information or engage it in a

meaningful way. They are not "assaulted" with information in the way they might be with other, traditional forms of "public communication."

Indeed, in ACLU vs. Reno, the Supreme court determined that the unique nature of the Internet necessitates a distinct regulatory approach from traditional mass media, and that the nature of the medium is critical to determining the appropriate regulatory framework. The Court noted that "unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.'" [ACLU vs. Reno, No. 96-511]

Thus, while the Commission's past opinions have required disclaimer language for certain types of online communications via the Web and e-mail, the inclusion of the Internet under the definition of public communication in the BCRA raises the bar dramatically to regulate the use of the medium in ways Congress did not intend.

The BCRA clearly does not intend to limit other types of two-way interactions between citizens, interest groups, and candidates. To include the Internet in the final rules would, in our view, put the Commission well beyond the scope of the statute and into a critical public policy question that would be more appropriately left to Congress to decide.

To include the Internet in the definition of public communication under the BCRA will harm its future potential as a platform for political speech.

Although the Internet itself has been in existence since the early 1970s, it is only recently that the medium has emerged in the mainstream. Yet even with its explosive growth, just slightly more than 54% of all Americans use it today². Internet technology continues to evolve, and so does its application.

In the political environment, we are only in the earliest stages of exploring its true potential. Candidates and issue groups, and their consultants, are only just beginning to understand the capabilities of the Internet to engage voters.

Many of us, including Mindshare Internet Campaigns, believe strongly that the Internet has a unique potential to reinvigorate our democratic process. The open, decentralized nature of the medium, on which every user is a publisher, embodies the very essence of our democracy. We have found time and time again that speakers with a compelling message, regardless of resources, can

² "A Nation Online: How Americans Are Expanding Their Use of the Internet," National Telecommunications and Information Administration, February 2002

quickly mobilize large constituencies of like-minded citizens to have an impact on national debates.

The Commission has to date been especially careful to avoid burdening this nascent medium with excessive regulations. To do so, the Commission has correctly concluded, would risk stifling its growth before the baby takes its first real steps toward adolescence.

For these reasons, we encourage the Commission to exclude the Internet from the definition of public communication in 11 CFR 100.26.

Mindshare Internet Campaigns applauds the care and foresight the Commission has applied to date with respect to the Internet. And on this particular question, the Commission has made the correct interpretation of the BCRA by following the explicit language of the Act. To expand the interpretation, and include elements which Congress explicitly rejected, risks the very future of the Internet as a platform for public discourse and political activity.

Thank you for the opportunity to comment on this important issue. We look forward to the Commission's continued attention to these critical questions.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Seiger', with a stylized flourish extending from the bottom right.

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